MOTION FILED
OCT -2 1981

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1251

UNITED STATES OF AMERICA,
Petitioner,

vs.

VOGEL FERTILIZER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MOTION FOR SPECIAL LEAVE TO FILE AN AMICUS CURIAE BRIEF AND BRIEF FOR AMICUS CURIAE DELTA METALFORMING COMPANY, INC. IN SUPPORT OF VOGEL FERTILIZER COMPANY, Respondent

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MOTION FOR SPECIAL LEAVE TO FILE AN AMICUS CURIAE BRIEF

Interest of Movant in the Instant Case

Movant, Delta Metalforming Company, Inc. ("Delta") is the respondent in another case presently before the Court, *Commissioner of Internal Revenue, Petitioner v. Delta Metalforming Co., Inc., Respondent,* No. 80-1499, which involves the same legal issue as does the instant case. Delta timely filed a motion to consolidate the two cases for purposes of argument,

but its motion was denied. Delta has just received copies of the briefs of the United States and of Vogel Fertilizer Company, and believes that certain non-tautological observations would be useful to the Court.

Argument for Granting Permission to File an Amicus Curiae Brief.

Delta recognizes that the usual time limitation for filing a motion for leave to file an *amicus curiae* brief under Rule 34 of the Rules of the Court has expired. Delta nonetheless respectfully requests that the Court grant permission for Delta to file an *amicus curiae* brief because the facts of *Commissioner of Internal Revenue, Petitioner v. Delta Metalforming Co., Inc., Respondent,* No. 80-1499, already pending before the Court, highlight certain aspects of the legal issues presented in both this case and case No. 80-1499 which were not adequately presented in the principal briefs of Petitioner, Respondent and *Amici Curiae* Dixie Realty Co., et al in this case.

Delta's timely motion to consolidate case No. 80-1499 with this case for purposes of argument has been denied and no other means are available for presentation to the Court of certain relevant considerations. Delta therefore respectfully moves that the Court grant it leave to file this *amicus curiae* brief under the general power of the Court to govern the administration of cases.

BRIEF FOR AMICUS CURIAE

Summary of Argument.

The "single share" argument — that had Richard

Crain held just one share of stock the government's position would be correct — is without merit. The very nature of an objective standard is to select some clearly defined point as a basis for making distinctions. Furthermore, the holding of but a single share confers significant rights which a non-shareholder does not have.

The Treasury regulations should be accorded no presumption of correctness because the Treasury wrote and interpreted the statute for Congress, and then adopted regulations which exceeded the scope of the Treasury's presentation to Congress; under these circumstances the statute should be construed against the Treasury's subsequent expanded interpretation.

Argument

1. *A Single Share*

On Pages 10 and 20 of the Brief for the United States, the Solicitor General states that "the most telling point" against the statutory interpretation by the Court of Claims is that under that Court's view, Vogel Popcorn would have constituted a brother-sister control group if Richard Cain owned but a single share of Vogel Popcorn. Whenever a mathematical or numerical standard is used, obviously, failure to meet the standard by the smallest integer is the most difficult position to justify — such is the nature of numerical standards. Indeed, under §1563(e)(5)(A) of the Code, the very section under consideration, the direct ownership of but a single share of stock precludes a spouse from avoiding certain attribution rules. See also Treas. Reg. § 1.1563-3(b)(5)(ii)(a). The government's untenable

argument — which it views as "the most telling point" — is evidence, strong evidence, of the meritless position of the government in this case.

Ownership of only one share of stock in a corporation has significant substantive benefits. Even a single share in the formative years of a company such as Xerox or Apple Computer would have had significant economic value. If the one share were one of 10 shares outstanding, it would be a material part of the ownership. The difference between owning no shares and one share is the most significant integral step in stock ownership. The owner of a single share has the right to sue an officer or director of the corporation who breaches his fiduciary responsibility to the corporation and to prevent, for examples, excessive salaries and other acts of self-dealing. He also has standing to sue under the Securities Exchange Act of 1934. See *Rekant v. Desser,* 425 F.2d 872 at 876 (5th Cir. 1970), where a shareholder with six shares of admittedly "practically worthless" stock had standing to sue under 10(b) of the Securities Exchange Act of 1934).[1] A holder of only one share has the opportunity to see corporate records, which could include significant economic data valuable to the shareholder. Ownership of a single share means being in, not out, being a participant, a sharer, an owner, a proprietor, being able to talk of "my company". The Code encourages employee stock ownership, and even gives tax credits for corporations to provide employee ownership; IRC § 46(a)(2)(A) (iii) and (E) and

[1] In footnote 9, J. Wisdom said: "It is a disconcerting thought that a shareholder with his tiny holding should have access to as powerful a weapon as 10(b). The plaintiff, however, is in a fiduciary relationship to the other shareholders as a consequence of bringing a derivative action in a class action."

§ 48(n), see also IRC § 422A and § 402(e)(4)(J). For the government to argue that stock ownership is meaningless is cant.

The importance of the distinction between owning shares and not owning shares is clearly demonstrated in the case of Delta Metalforming Co., Inc. ("Delta"). Delta's case involves three corporations, two of which are roughly equally owned by four individuals and the third, Delta, by only three individuals. See the government's Petition for a Writ of Certiorari in case No. 80-1499 at page 2. Not only does this fourth individual, F.T. Sharp, have no economic, securities, law, or dissenting shareholder rights vis-a-vis Delta, but the balance of power within the Delta corporation is significantly different from that of the two other corporations because of his non-ownership of any shares. Any two Delta shareholders may approve even corporate actions requiring a two-thirds vote for Delta, but these same two shareholders could not do so in either of the two other corporations without convincing F. T. Sharp to join them.[2] The "missing" shareholder, although obviously unnecessary in obtaining shareholder approval of Delta corporate action, holds a balance of power regarding matters requiring two-thirds shareholder approval in the two other corporations, and the fact that this shareholder owns no shares in Delta

[2] The Texas Business Corporation Act, applicable to Delta, generally requires two-thirds shareholder approval for amendment of the Articles of Incorporation, mergers, consolidations, voluntary dissolution, revocation of dissolution proceedings, distributions out of reductions in stated capital, the corporation's purchase of its own shares other than from earned surplus and any other matter stated in the Articles of Incorporation as requiring two-thirds approval. See Hamilton, *Texas Practice*, Vol. 19 § 499.

cannot therefore be regarded, as the government urges, to be of no consequence.

2. *Square Corners*

The Treasury initiated the changes to section 1563(a)(2) and presented Congress with examples of why these changes were necessary. Brief for *Amici Curiae* Dixie Realty Company, Inc., et al, Pp. 24-25. For the Treasury to enlarge its own interpretation after Congress has adopted the Treasury position is not cutting square corners with taxpayers. Credence should not be given to the government's argument that the Treasury's interpretation reflects Congressional intent because it was the Treasury who initiated the entire change and presented to Congress the examples and reasons for the change, none of which included the interpretation the Treasury now proposes. This leads to the conclusion that the Treasury at the time it presented the proposal to Congress did not believe that the proposal then meant what the Solicitor General contends it now means. Presumably the Treasury did not intentionally withhold from Congress a different intent. The Treasury should have known what it was doing when it submitted the proposal to Congress, and, as the author of the statute, should not now be permitted to argue that its hindsight interpretation should be sustained on the ground of presumptive correctness.

CONCLUSION

The Court should affirm the decision of the Court of Claims for the reason stated here and in the briefs of Vogel Fertilizer Company and Dixie Realty Company, et al.

Respectfully submitted

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Neil J. O'Brien
Gardere & Wynne
Attorney for Movant

September 28, 1981.

CERTIFICATE OF SERVICE

Counsel certifies that service of this motion and brief has been made on counsel for petitioner in compliance with U.S. Supreme Court Rules 22.1, 28.3 and 28.4(a) by mailing three copies hereof by registered mail, return receipt requested, first-class postage pre-paid to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530 on September 28, 1981, and that three copies of this motion and brief have been mailed in like manner to Ronald C. Jensen of Baird, Holm, McEachen, Pendersen, Hamann & Haggart, counsel for respondent, at 1500 Woodmen Tower, Omaha, Nebraska 68102.

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Neil J. O'Brien
Gardere & Wynne
Attorney for Movant

STATEMENT OF FILING

Counsel certifies by a signed and notarized statement that, to the knowledge of counsel as a member of the Bar of this Court, this motion and brief is duly filed with this Court in compliance with U.S. Supreme Court Rules 22.1 and 28.2 by deposit of 40 copies thereof in a United States post office or mailbox with first-class postage prepaid and addressed to the Clerk of the Court on September 28, 1981.

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Neil J. O'Brien
Gardere & Wynne
Attorney for Movant

THE STATE OF TEXAS)
)
COUNTY OF DALLAS)

The above statement has been SUBSCRIBED AND SWORN TO BEFORE ME on the twenty-eighth day of September, 1981, to certify which witness my hand and official seal.

(SEAL)

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Notary Public, State of Texas